78-678

Supreme Court, U.S.
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No. 78-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

COLORADO RIVER WATER CONSERVATION DISTRICT; SOUTHWESTERN WATER CONSERVATION DISTRICT; NORTHERN COLORADO WATER CONSERVANCY DISTRICT; CITY OF COLORADO SPRINGS; CITY OF AURORA; BOARD OF WATER WORKS, CITY OF PUEBLO; AND THE CITY AND COUNTY OF DENVER, *Petitioners*

v.

ENVIRONMENTAL DEFENSE FUND, INC.,

and

DOUGLAS M. COSTLE, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Dated October 20, 1978

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Colorado River Water Conservation District, Southwestern Water Conservation District, Northern Colorado Water Conservancy District, City of Colorado Springs, City of Aurora, Board of Water Works, City of Pueblo, and the City and County of

Denver, acting by and through its Board of Water Commissioners (hereinafter Districts and Cities) respectfully pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia Circuit entered July 31, 1978.

OPINIONS BELOW

The unreported *per curiam* Order and accompanying Memorandum of the Court of Appeals dated July 31, 1978 denying the petitioners' motion for summary reversal and granting respondents' motions for summary affirmance of an order of the District Court denying intervention to petitioners appear in Appendix 1 hereto. The District Court's Order and Memorandum Opinion of April 20, 1978 denying intervention are attached hereto as Appendix 2 (unofficially reported at [1978] 12 ENVIR. REP. (BNA) 1001).

JURISDICTION

The judgment of the Court of Appeals was entered on July 31, 1978. (Appendix 1) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). *See, United Automobile Workers* v. *Scofield,* 382 U.S. 205 (1965).

QUESTION PRESENTED

Whether several water districts and cities in Colorado should have been denied intervention under the doctrine of *parens patriae* in a suit involving salinity controls on the Colorado River in which the State of Colorado had been granted intervention, where the court conceded that denial of intervention could impair the interests of the districts and cities and the State had advised the court that the districts and cities had rights involved "which they only" could represent.

STATUTE INVOLVED

Rule 24 of the Federal Rules of Civil Procedure provides in pertinent part:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

STATEMENT

This case involves the denial of intervention to several cities and water districts in Colorado in a suit contesting the Environmental Protection Agency's approval of state water quality standards and state implementation plans for the control of salinity in the Colorado River Basin. The suit was filed in the U.S. District Court for the District of Columbia by the Environmental Defense Fund (EDF) on August 22, 1977 seeking declaratory, injunctive and mandatory relief against officials of the Environmental Protection Agency and the Department of the Interior.[1] The

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[1] EDF claimed jurisdiction "under 28 U.S.C. § 1331 (Federal Question); 33 U.S.C. § 1365 (FWPCA Citizen Suits); 28 U.S.C.

seven states of the Colorado River Basin—Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming—petitioned to intervene and moved, as had the Government, for a change of venue to Colorado. Timely motions to intervene and motions to transfer were also filed by the Districts and Cities petitioning here, by Utah Power and Light Company and by the Metropolitan Water District of Southern California. The Government did not oppose the proposed interventions by the States, but did oppose the others. EDF argued for limitations on participation by the States, and strongly opposed all other motions to intervene. EDF also opposed transfer and the Government's motion to change venue was denied by the court on December 23, 1977, prior to action on the motions to intervene.

On January 18, 1978 at a status call the court granted intervention to the States but reserved action on the other petitions to intervene. On that same date a motion to intervene was filed jointly by the Mountain States Legal Foundation, the National Water Resources Association, the Colorado Water Congress and the Yuma Auxiliary Project (MSLF group) which was also opposed by EDF and the Government.

The Districts and Cities moved to intervene because of their essential dependence upon the waters of the Colorado River system to support the homes, farms and industries within their respective jurisdictions. Two of the Districts (Colorado River and Southwestern) are located entirely within and use water solely from the natural basin of the Colorado River and are dependent on the river system as substantially the sole

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§§ 2201-02 (Declaratory Judgment); 28 U.S.C. § 1361 (Mandamus); 28 U.S.C. § 1337 (Commerce Regulation); and 42 U.S.C. § 4321 *et seq.* (NEPA)."

source of water supply for their areas. The Northern Colorado District and all of the Cities use substantial quantities of Colorado River water by way of transmountain diversion and claim dependence on diverted water to sustain their areas. The Districts and Cities serve an essential public utility function of assuring and supplying water to their residents and have assumed enormous bonded indebtedness and other financial obligations in the planning and development of extensive water supply systems.

In addition the Colorado River and Southwestern Districts are specifically charged by the Legislature of the State which established them in 1937 and 1941 "to safeguard for Colorado, all waters to which the state . . . is equitably entitled under the Colorado river compact" (Colo. Rev. Stat. § 37-46-101 and § 37-47-101 (1973)). All of the seven entities petitioning here are similarly responsible under state law for assuring a dependable water supply for their areas. All of them depend and rely upon the Colorado River Compact of 1922; the Upper Colorado River Basin Compact of 1948, 63 Stat. 31; the Boulder Canyon Project Act, Act of December 21, 1928, 45 Stat. 1057; the Boulder Canyon Project Adjustment Act, Act of July 19, 1940, 54 Stat. 774; the Colorado River Storage Project Act of 1956, 70 Stat. 111; the Colorado River Basin Project Act of 1968, 76 Stat. 393, and other laws, compacts, treaties and decrees collectively known as the Law of the River which provide for the beneficial use of the waters of the Colorado River System, and which the petitioners believe would be indirectly stultified should EDF's suit prevail.

Since EDF seeks to destroy the currently approved State standards with respect to salinity control, under which the Districts and Cities would expect to achieve

their rights and discharge their responsibilities, those entities have a clear need to participate in this suit. In addition the Districts and Cities urged several defenses not urged by other intervenors, including their reliance upon the Colorado River Basin Salinity Control Act of 1974, passed by the Congress two years after the Federal Water Pollution Control Amendments of 1972 which earlier statute EDF uses as the principal basis for this litigation. The Districts and Cities believe that in the 1974 Act,[2] under which EDF's standing to sue is doubtful, Congress intended to assure continuing achievement of Colorado River Compact entitlements by the water users by directing the Secretary of the Interior, not EPA, to implement the policy on salinity control agreed to by the States and EPA in 1972, with EPA to cooperate with the Secretary to-

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[2] The Colorado River Basin Salinity Control Act of 1974, 88 Stat. 266, 43 U.S.C. § 1591, provides in pertinent part:

> (a) The Secretary of the Interior shall implement the salinity control policy adopted for the Colorado River in the "Conclusions and Recommendations" published in the Proceedings of the Reconvened Seventh Session of the Conference in the Matter of Pollution of the Interstate Waters of the Colorado River and its Tributaries in the States of California, Colorado, Utah, Arizona, Nevada, New Mexico and Wyoming, held in Denver, Colorado, on April 26-27, 1972, under the authority of section 1160 of Title 33, and approved by the Administrator of the Environmental Protection Agency on June 9, 1972.
>
> (b) The Secretary is hereby directed to expedite the investigation, planning, and implementation of the salinity control program generally as described in chapter VI of the Secretary's report entitled, "Colorado River Water Quality Improvement Program, February 1972."
>
> (c) In conformity with subsection (a) of this section and the authority of the Environmental Protection Agency under Federal laws, the Secretary, the Administrator of the Environmental Protection Agency, and the Secretary of Agriculture are directed to cooperate and coordinate their activities effectively to carry out the objective of this subchapter.

ward that end. With the Districts and Cities being the only proposed parties raising this important question it may never be squarely addressed absent their participation.

The State of Colorado urged the court to grant intervention to the Districts and Cities in a memorandum filed with the court on February 1, 1978 (Appendix 3 hereto). That filing noted that the Districts and Cities were owners of Colorado River rights "which they only can properly represent"; that while the State represented its citizens generally "it cannot represent specific concerns or groups of citizens" nor could it "represent or protect each individual water right owner's specific interest"; and that the Districts and Cities "have significant investment in facilities and governmental powers and responsibilities which may be affected by this litigation". Nevertheless, without any mention of these urgings of the State, the district court denied intervention in its order of April 20, 1978 (Appendix 2) on the doctrine of *parens patriae* citing this Court's decision in *New Jersey* v. *New York*, 345 U.S. 369 (1953). Contrasted therewith however, and despite the urgings of the petitioners here concerning their statutory responsibilities to the State with respect to the Colorado River Compact, the court granted limited intervention to the MSLF group "for the limited purpose of briefing this court on matters regarding the various interstate water use compacts in the Colorado River Basin." (Appendix 2, p. 5a)

The Court of Appeals for the District of Columbia Circuit by *per curiam* order affirmed the District Court's denial of intervention on July 31, 1978 (Appendix 1), relying on the *parens patriae* principle. The

court (Chief Judge Wright and Judge McGowan) stated that where the views of entities like the Districts and Cities differ from those of the States, "those differences are to be resolved through the internal mechanisms, such as the political processes, of the sovereign states rather than by the federal courts." (Appendix 1, p. 3a)

The case continues apace in the district court with discovery, the preparation of an administrative record, requests for admissions and interrogatories now in process. That court denied defendants' motions for judgment on the pleadings on September 1, 1978 and a status call has been set for December 8, 1978. As the denial of intervention forever bars the Districts and Cities from representing their specific interests in litigation so important to their economies and believing that this denial results from a fundamental misreading of the *parens patriae* principle in its application to Rule 24 of the Federal Rules of Civil Procedure, the Districts and Cities seek corrective action by this Court.

REASONS FOR GRANTING THE WRIT

There are special and important reasons for the granting of a writ of certiorari in this case. First among them, the decision of the Court of Appeals is a misreading and a misapplication of this Court's decision in *New Jersey* v. *New York*, 345 U.S. 369 (1953), and uses the doctrine of *parens patriae* in this Court's original jurisdiction to bar participation at the trial level by any local entity or citizen if his State is a party. The suggestion to resort to "the political processes" to protect interests threatened by wide-ranging litigation sets an impossible standard for the guidance of the States and their citizens who must defend against

suits remote from their areas brought by interests over which they have no control.

In addition, the writ should be granted because the holding of the Circuit is inconsistent with this Court's decision in *Trbovich* v. *United Mine Workers*, 404 U.S. 528 (1972), and is also inconsistent with previous decisions by the D.C. Circuit correctly applying *Trbovich*.

We treat with these matters in turn below.

1. The Circuit's holding should not be permitted to stand because it is a misreading and misapplication of this Court's decision in *New Jersey* v. *New York*, 345 U.S. 369 (1953). That case held that the original jurisdiction of the Court should not be expanded by permitting the intervention of the City of Philadelphia when the Commonwealth of Pennsylvania was already a party. The court below was in fundamental error in extending the rule of *New Jersey* v. *New York* to cases such as here presented which do not involve the original jurisdiction of the Supreme Court (Appendix 1, p. 3a, n.2). The fatal flaw in the Court of Appeals' analysis is demonstrated by reference to the full language from *New Jersey* v. *New York*, 345 U.S. at 373, only part of which is quoted in the judgment below as a basis for decision:

> Our original jurisdiction should not be expanded to the dimensions of ordinary class actions. An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state. *See, Kentucky* v. *Indiana*, 281 U.S. 163 . . . .

Kentucky v. *Indiana,* 281 U.S. 163 (1930), cited as authority for the above statement, was also a case involving the original jurisdiction of this Court. In that decision, the Court stated:

> A State, suing, or being sued, *in this Court, by virtue of the original jurisdiction over controversies between States,* must be deemed to represent all its citizens.

Id. at 173 (emphasis added). That the original jurisdiction was a crucial factor in these decisions is evidenced by this Court's recent decision in *Uni'ed States* v. *Nevada,* 412 U.S. 534 (1973). In that case, the Court made a clear distinction between the result of an intervention argument addressed to the Court's original jurisdiction and the result of the same argument when intervention at the federal district court level was involved. *Id.* at 538. The Court stated:

> We need not employ our original jurisdiction to settle competing claims to water within a single State. This is particularly the case where individual users of water in the Newlands Project, who ordinarily would have no right to intervene in an original action in this Court, *New Jersey* v. *New York,* 345 U.S. 369 . . . [citations omitted] would have an opportunity to participate in their own behalf if this litigation goes forward in the District Court.

Id. This statement is indicative of the concern under the law which this Court holds for not depriving interested parties of a forum in which to participate and defend their rights. That concern is totally lacking in the judgment below which instead remits the petitioners to "the political processes," a suggestion totally unresponsive to the need and the right to be permitted to defend vital interests under attack in the courts.

In addition to the fact that this is not a case in the original jurisdiction, there are at least two other important distinctions between *New Jersey* v. *New York* and this case making *New Jersey* an inappropriate precedent upon which to rely here. First, in *New Jersey* the State of Pennsylvania specifically opposed the application of the City of Philadelphia to intervene. Quite the opposite, here the State of Colorado urged the grant of intervention to the Districts and Cities. Colorado's memorandum in support (Appendix 3) noted that while it "does represent the entire state and the concerns of its citizens and agencies generally, it cannot represent specific concerns or groups of citizens", that the petitioners had interests which "they only can properly represent" and in addition, that these entities had "significant investment in facilities and governmental powers and responsibilities which may be affected" by the suit. This filing of the State was ignored by the district court. The circuit merely referred to petitioners' contentions in this regard as "lack of state opposition". Surely the State's urgings were entitled to more consideration than this.

Secondly, in the *New Jersey* case, the Court found the interests of the city and state to be virtually identical. 345 U.S. at 374. In contrast, the petitioners and the state in the instant case agree that their respective interests are significantly different. Moreover, the district court based its decision upon the explicit assumption that their interests were different. *See,* Appendix 2, p. 11a. These distinctions serve to highlight the misapplication of *New Jersey* v. *New York* as precedent here.

An examination of the rationale for the *parens patriae* doctrine further underscores the misapplica-

tion of that doctrine to this case. Traditionally, the terms *parens patriae* was used to refer to the king's power as guardian of persons under legal disabilities who were unable to act for themselves. *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 257 (1972). As stated in *Hawaii* v. *Standard Oil Co., id.* at 257-58, the nature of the *parens patriae* suit has been greatly expanded in the United States and those cases frequently involve "the right of a State to sue as *parens patriae* to prevent or repair harm to its 'quasi-sovereign' interests." It does not follow from this concept of *parens patriae,* however, that a state is the only party able to represent the interests of some of the citizens of the state. Similarly, it does not follow that a state can adequately represent all the diverse interests of its citizens. *See, United States* v. *Reserve Mining,* 56 F.R.D. 408, 419-20 (D. Minn. 1972). It is clear that the doctrine of *parens patriae* has developed from a doctrine which provided protection solely for those unable to protect themselves to a doctrine which permits a state to bring an affirmative suit to protect all of its citizens. The doctrine should not now be turned on its head to prohibit those who are fully capable of defending themselves from being permitted to intervene in an action to protect their interests. That, of course, is precisely the result of the judgment below. Especially in light of the liberal standard for intervention adopted by this Court in *Trbovich* v. *United Mine Workers,* 404 U.S. 528 (1972), such an inappropriate application of *parens patriae* should be rejected by this Court.

If the Court of Appeals' decision is allowed to stand, many separate and important interests within individual states may be frozen out of participation simply because the state in which they are located itself inter-

venes. The judgment below presupposes that in any given litigation all within a state must speak with one voice and all differing views within a state must be foreclosed:

> When the views of appellants are identical to those of their states, there is no need for intervention; when the views of appellants differ from those of their states, those differences are to be resolved through the internal mechanisms, such as the political processes, of the sovereign states rather than by the federal courts.

(Appendix 1, p. 3a). On this reasoning, once the state has intervened in federal court, anyone else within the state is cut off. This is particularly damaging to those who desire to assert an interest separate from that of the state or a differing view. This policy of "when the State is a party no one else need apply" cannot be correct. It is of substantial importance that it be rejected by this Court.

2. The judgment below is also in conflict with the recent opinion of this Court in *Trbovich* v. *United Mine Workers,* 404 U.S. 528 (1972), concerning the standard to be applied in determining the issue of adequacy of representation. The decision is further in conflict with precedents within the District of Columbia Circuit itself on this same issue. Both these conflicts suggest that the law has been applied unfairly to the petitioners. These conflicts provide further special and important reasons for review in this Court.

In *Trbovich* this Court held that the adequacy of representation prong of Rule 24(a) of the Federal Rules of Civil Procedure was satisfied "if the applicant shows that representation of his interest 'may be' inadequate, and the burden of making that showing

should be treated as minimal." *Id.* at 538 n.10. Instead of applying this minimal standard, the Court of Appeals adopted a "strict test" requiring the showing of a "compelling interest" which was not represented by existing parties (Appendix 1, p. 3a). In support of its adoption of this strict test, the court again relied on *New Jersey* v. *New York,* 345 U.S. 369 (1953), which was not only decided by this Court long before the adoption of the 1966 amendments to Rule 24, but which also applied such test for original jurisdiction purposes only. The 1966 amendments made changes in the language governing inadequacy of representation, and therefore the reliance below on pre-1966 litigation to interpret Rule 24 was not justified. This should be corrected to assure adherence to this Court's standard in *Trbovich.*

The Court of Appeals' failure to follow *Trbovich* is especially unsettling when compared to its post-amendment decisions interpreting Rule 24. In *Nuesse* v. *Camp,* 385 F.2d 895 (D.C. Cir. 1967), the court stated:

> While the change in wording does not relate to any change in standard as such, it underscores both the burden on those opposing intervention to show the adequacy of existing representation and the need for a liberal application in favor of permitting intervention.
>
> Little guidance for the present case is furnished by the discussion in the pre-amendment cases. . . .

Id. at 702. In spite of this view, the court in the instant case not only adopted a "strict test" for the determination of adequacy of representation but took it from a pre-1966 case in this Court's original jurisdiction, completely ignoring its own precedent.

Ironically, the *Trbovich* standard, which should have been applied here, was expressly followed by the District of Columbia Circuit in *Hodgson* v. *United Mine Workers*, 473 F.2d 118 (D.C. Cir. 1972), and was recently applied in *Natural Resources Defense Council* v. *Costle*, 561 F.2d 904 (D.C. Cir. 1977). Nevertheless this Circuit failed to follow that standard in its holding below. Review by this Court is thus required in the interest of assuring the consistent application of this Court's precedent in *Trbovich*.

Further, if petitioners are to be adequately represented below, expedited action would be appropriate here, as in *Trbovich*, 404 U.S. at 530 n.4, because the pending proceedings are actively ongoing.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted. Petitioner further respectfully suggests that the result below is so clearly out of line with the opinions of this Court and with the opinions of the Circuit itself as to warrant summary reversal by this Court.

Respectfully submitted,

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APPENDIX

APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1977

Filed July 31, 1978

Civil Action No. 77-1436

No. 78-1471

ENVIRONMENTAL DEFENSE FUND, INC.

v.

DOUGLAS M. COSTLE, AS ADMINISTRATOR U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.

UTAH POWER AND LIGHT COMPANY, *Appellant*

No. 78-1515

Civil Action No. 77-1436

ENVIRONMENTAL DEFENSE FUND, INC.

v.

DOUGLAS M. COSTLE, AS ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY

THE METROPOLITAN WATER DISTRICT OF
SOUTHERN CALIFORNIA, *Appellant*

No. 78-1566

Civil Action No. 77-1436

ENVIRONMENTAL DEFENSE FUND, INC.

v.

DOUGLAS M. COSTLE, AS ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.
COLORADO RIVER WATER CONSERVATION DISTRICT, ET AL.,
Appellant

BEFORE: Wright, Chief Judge; McGowan, Circuit Judge

ORDER

On consideration of appellants' motions for summary reversal, of appellees' motions for summary affirmance, of the motions by Environmental Defense Fund for oral argument and to strike affidavit in appellant Utah Power and Light Company's papers, of the responses filed with respect to the foregoing motions, and, for the reasons set forth in the attached memorandum, it is

ORDERED by the Court that the appellants' motions for summary reversal are denied, it is

FURTHER ORDERED that the motion to strike affidavit attached to appellant Utah Power and Light Company's papers is granted and, it is

FURTHER ORDERED by the Court that appellees' motions for summary affirmance are granted and the order of the District Court on appeal herein be, and the same hereby is, affirmed.

The Clerk is directed to transmit a certified copy of this order to the District Court.

Per Curiam

MEMORANDUM

Nos. 78-1471, 78-1515 & 78-1566

We affirm the order of the District Court denying intervention to appellants. Since the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming have intervened, in our view the case is governed by *New Jersey* v. *New York*, 345 U.S. 369 (1953), and under the *parens patriae* principle set forth in that case, intervention as of right must be denied.[1] That "principle is a *necessary recognition* of sovereign dignity, as well as a working rule for good judicial administration." *Id.* at 373 (emphasis supplied). When the views of appellants are identical to those of their states, there is no need for intervention; when the views of appellants differ from those of their states, those differences are to be resolved through the internal mechanisms, such as the political processes, of the sovereign states rather than by the federal courts.

We have considered appellants' efforts to distinguish *New Jersey* v. *New York*, and we do not find them persuasive.[2] Under the doctrine of that case, an "intervenor whose state is already a party should have the burden of showing some *compelling interest in his own right*," *id.* at 373 (emphasis supplied). Appellant's stated justifications for intervention do not meet this strict test. Appellants urge that their states do not oppose intervention. Lack of state opposition, however, does not rise to the level of a compelling interest in separate representation. The states may not readily relinquish their sovereign function of resolving differences (if any) among their political subdivisions' and

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[1] We also do not find that the District Court abused its broad discretion to deny permissive intervention.

[2] The Supreme Court's opinion in that case places little emphasis on the fact that the case was within the Court's original jurisdiction, and does not even mention the wording of Fed. R. Civ. P. 24(a) of that time.

citizens' views on water plans and rights as they relate to this case once they have intervened to represent those subdivisions and citizens. Appellant Metropolitan Water District of Southern California (Southern California) urges that its interests created by federal statutes and water contracts cannot be adequately represented by the State of California. In the context of this case, we do not find that its interests require separate representation.[3]

We emphasize that our decision imports no view whatsoever on the merits of the case, which were neither briefed for the Court not considered by it on these motions.

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[3] We are not surprised that the states welcome intervention on their side. The position of the states was a factor relevant to the District Court's decision on permissive intervention, but we do not find that it creates mandatory intervention rights.

Southern California has not made the showing of *concrete* adverse interests of state and locality in this context required to find that separate representation is necessary in this case. We assume that if the District Court found, in the deliberation on the merits, that some major argument or claim advanced by California had to be rejected solely on the grounds that it was personal to the absentee Southern California, *cf. New Mexico* v *Aamodt*, 537 F.2d 1102, 1107 (10th Cir. 1976), that the District Court would reconsider granting Southern California limited intervention.

APPENDIX 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-1436

ENVIRONMENTAL DEFENSE FUND, INC., *Plaintiff*

v.

DOUGLAS M. COSTLE, et al., *Defendants.*

Filed April 20, 1978

ORDER

This matter comes before the court on four motions to intervene. Upon consideration of the motions, the memoranda submitted in support thereof and in opposition thereto, and the entire record now before the court, and for the reasons stated in the memorandum filed in this case this same day, it is, by this court, this 20th day of April, 1978,

ORDERED that the motion for intervention as of right, or alternatively for permissive intervention, submitted by the Colorado River Water Conservation District; the Southwestern Water Conservation District; the Northern Colorado Water Conservancy District; the city of Colorado Springs, Colorado; the city of Aurora, Colorado; the Board of Water Works of the City of Pueblo, Colorado; and the city and county of Denver, Colorado be, and the same hereby is, denied; and it is further

ORDERED that the motion for intervention as of right, or alternatively for permissive intervention, submitted by the Metropolitan Water District of Southern California be, and the same hereby is, denied; and it is further

ORDERED that the motion for intervention as of right, or alternatively for permissive intervention, submitted by the Utah Power and Light Co. be, and the same hereby is, denied; and it is further

ORDERED that the motion for intervention as of right, or alternatively for permissive intervention, submitted by the Mountain States Legal Foundation, the National Water Resources Association, the Colorado Water Congress, and the Yuma Auxillary Project be, and the same hereby is, granted in part and denied in part; and it is further

ORDERED that the Mountain States Legal Foundation, the National Water Resources Association, the Colorado Water Congress, and the Yuma Auxillary Project be, and hereby are, permitted to intervene as a group for the limited purpose of briefing this court on matters regarding the various interstate water use compacts in the Colorado River Basin.

/s/ THOMAS A. FLANNERY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action 77-1436

ENVIRONMENTAL DEFENSE FUND, INC., *Plaintiff*

v.

DOUGLAS M. COSTLE, et al., *Defendants.*

Filed April 20, 1978

MEMORANDUM OPINION AND ORDER

This matter comes before the court on motions to intervene filed by a variety of private and public entities. The case in chief involves a dispute regarding the salinity level in the waters of the Colorado River. Pursuant to 33 U.S.C. §§ 1311-1313, the seven states of the Colorado River Basin, after several years of interstate negotiations, adopted salinity control standards for the River. In 1976, the Environmental Protection Agent (EPA) approved the salinity standards agreed to by the states. As yet, no general water quality standards have been devised by the states. Plaintiff Environmental Defense Fund (EDF) has filed a complaint containing six claims regarding this situation. First EDF contends that the salinity standards promulgated by the states and adopted by EPA fail to meet the requirements of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.*, and that the Director of EPA acted contrary to his mandatory duties in approving the plan. Second, EDF asks that the federal defendants be compelled to promulgate acceptable salinity standards. Third, EDF asks that EPA take over the states' task of identifying point sources where salinity standards are not being met and to establish daily maximum load levels. Fourth, EDF asks that the planning process assigned to the states under section 1313 be closely monitored by EPA. Fifth

EDF seeks to compel the Department of the Interior to implement the water quality policies promulgated by the Basin states in their 1972 Conference and adopted by the Colorado River Salinity Control Act of 1974, 88 Stat. 270. Sixth, EDF seeks to compel the federal defendants to seek alternate ways in which to deal with the salinity problem. In light of the broad nature of the participation of the Colorado River Basin states in the promulgation of the regulations at issue in this case, this court allowed the seven Basin states to intervene as defendants in this matter on January 19, 1978.

It is against this background that the present motions to intervene must be judged. Four motions to intervene are currently pending before this court. The first motion was filed by a group of state and municipal public entities from the state of Colorado. For the purpose of convenience, these entities shall be referred to as Intervention Group I. The second motion was filed by the Metropolitan Water District of Southern California. The third motion was filed by the Utah Power and Light Co., a utilities company. The fourth motion was filed by a group of organizations representing a variety of interests in the Basin area, and shall be referred to as Intervention Group II. Although there is some overlapping of the issues presented by each of these motions, each motion shall be analyzed separately so that any distinct interests represented by the intervenors will be accorded full consideration.

Each of these entities seeks intervention as of right, or in the alternative permissive intervention. The request for intervention as of right shall be discussed first.

I. Intervention as of Right.

Intervention as of right is governed by Federal Rule of Civil Procedure 24(a), and particularly in this case by subdivision (a)(2), which states:

> Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

It is undisputed that all of the proposed intervenors in this case have at least a minimal interest in the regulations governing the salinity levels in the Colorado River since they all depend on the River, to one extent or another, for water or economic use. Therefore, the issues before the court are whether the proposed intervenors' interests will be practically impaired by the disposition of this case, and whether the present parties adequately represent the proposed intervenors' interests.

A. Intervention Group I.

As indicated earlier, the seven entities in this group are all state or municipal public entities from the state of Colorado. The Colorado River Water Conservation District is an agency of the state of Colorado charged with preserving the waters allocated to Colorado pursuant to the interstate Colorado River Compact. It is the principle water policy agent of the state regarding the headwaters of the Colorado River. The second member of this group is the Southwestern Water Conservation District, which is another state agency which is charged with oversight of the tributaries of the Colorado River in the southern part of the state. The third member is the Northern Colorado Water Conservancy District, a state agency which contracts with the U.S. Bureau of Reclamation for the repayment of facilities constructed by the U.S. in the Colorado-Big Thompson Federal Reclamation Project. The fourth member is the city of Colorado Springs, Colorado. The fifth member is the city of Aurora, Colorado. The sixth member is the Board of

Water Works of the City of Pueblo, Colorado. The seventh member is the city and county of Denver, which appears through its Water Commission. The first three members are all state agencies which deal with water supply in one form or another. The last four are municipal corporations or the agencies thereof which seek to secure the water supplies for their populations.

1. *Practical Impairment of Interest.* The entities in Group I indicate that they feel that in light of their dependence on the Colorado River as a source of water and of income, denial of their motion to intervene in this suit will practically impair or impede their efforts to protect their rights to use of the River. The plaintiff and the Federal defendants dispute these contentions. They point out that if this court were to invalidate these regulations, then EPA would have to engage in rulemaking, during which the proposed intervenors could once again act to protect their positions. Further, the plaintiff and the federal defendants state that this case will have no stare decisis effect on the proposed intervenors in the context of this dispute. The plaintiff and the federal defendants view this case as only a possible first step in a process. If the regulations are upheld, the proposed intervenors retain their present water rights. If the regulations are overturned, the proposed intervenors suffer no immediate deprivation since the entire rulemaking process must begin over again.

Despite the apparent logic in the position advanced by the plaintiff and the federal defendants in regard to this requirement for intervention as of right, their position does not appear to comport with the law. In *Natural Resources Defense Council* v. *Costle*, 561 F.2d 904 (D.C. Cir. 1977), the court stated that, "[I]t is not enough to deny intervention under 24(a)(2) because applicants may vindicate their interests in some later, albeit more burdensome, litigation." *Id.* at 910. The *N.R.D.C.* case involved a situation in which this district court was closely involved in monitoring the implementation of a settlement agreement. The court's role

in the present case is much more limited, and to that extent the *N.R.D.C.* suit is distinguishable. However, the circuit court indicated that factors of convenience are especially relevant in cases of administrative review. *Id.* Since this case would seem to fall into that mold and assuming *arguendo* that the proposed intervenors have an interest distinct from those already represented in this case, intervention should not be denied solely on the grounds that those interests would not be impaired by an adverse disposition of this suit.

2. *Adequacy of Representation.* The more crucial question in this context therefore becomes whether the entities already in this suit will adequately represent the interests advanced by the proposed intervenors. The determination of this issue is complicated in this case by the presence of the seven Basin states as intervenor/defendants. As such, this court must determine whether the EDF, the federal defendants and, in this case, the state of Colorado adequately represent the interests advanced by the entities in Group I.

In order to shoulder the burden of proving inadequacy of representation under Rule 24(a)(2), the proposed intervenors need only show that the representation of their interests by the other parties may be inadequate and this burden is a minimal one. *Tbrovich* v. *United Mine Workers of America,* 404 U.S. 528, 538 n. 10, 92 S.Ct. 630, 636 n.10 (1972). The proposed intervenors contend that their interests, although not necessarily antagonistic to those of the state of Colorado, are sufficiently different and particularized to warrant a finding of inadequacy of representation. The plaintiff and the federal defendants argue that since the proposed intervenors in Group I are all state or municipal subdivisions of the state of Colorado, then the presence of the state in this case indicates that the interests of the proposed intervenors are adequately represented.

In asserting their case in support of intervention, the proposed intervenors place primary reliance on three cases: *N.R.D.C.* v. *Costle, supra; United States* v. *Reserve Mining Co.*, 56 F.R.D. 408 (D. Minn. 1972); and *New York P.I.R.G., Inc.* v. *Regents of Univ. of State of New York*, 516 F.2d 350 (2d Cir. 1975) [hereinafter cited as *P.I.R.G.* v. *Regents*]. However, all three of these cases are fundamentally inapplicable to the case at hand.

In *N.R.D.C.* v. *Costle, supra,* the government and several industrial groups had entered a settlement agreement whereby the EPA would promulgate certain sets of regulations pursuant to the Federal Water Pollution Control Act, *supra.* Only the participants in the settlement agreement would have input into the rulemaking proceedings and in the implementation and oversight proceedings in the district court. This court denied intervention to several other industrial groups on the theory that the EPA would adequately represent the interest that all regulations should be lawful, and the other industrial participants would assure that industries' point of view was presented. The circuit court reversed, stating that the additional industrial groups had an interest in the actual content of the regulations, not just in their legality. Furthermore, the circuit court indicated that since a variety of effluents were to be regulated, the various producers of these effluents should be heard. 561 F.2d at 912. In the present case, the court is not so intimately involved. This court's task is simply to rule on the validity of regulations already promulgated. If those regulations are found wanting, the statute provides that EPA, not this court, shall engage in *de novo* rulemaking. Furthermore, no action by this court in this case will limit the access of any of these proposed intervenors to any further rulemaking.

Whereas a settlement agreement expanded the court's function in the *N.R.D.C.* case, the court in *United States* v. *Reserve Mining Co.*, found its role expanded by statute.

Because the suit in that case was an abatement action brought by the United States to end the depositing of taconite into Lake Superior, the court determined that the Federal Water Pollution Control Act, 33 U.S.C. § 1160(c)(5), required it to weigh a variety of interests in determining whether the regulation had been violated and if compliance was feasible. 56 F.R.D. at 413. The court indicated that:

> The role of a court in such a situation, because of the nature of the proceedings and considerations which must be reviewed and undertaken pursuant to the statute, transcends ordinary civil litigation and makes a reviewing court more of an administrative tribunal than a court in an ordinary adversary civil case.

Id. The court noted that in such an atypical civil litigation, the interest requirement in an environmental matter should be inclusive, not exclusive. *Id.* In view of this expanded role, the court in *Reserve Mining* allowed wide intervention. Specifically important in the view of the proposed intervenors in this case is the fact that the court allowed several towns, villages and counties of the state of Minnesota to intervene. The court noted explicitly that the state of Minnesota itself was not a party to this proceeding, although it was Minnesota's regulation that was at issue. The court further noted that if Minnesota had intervened, allowing the local entities to intervene in this matter would create the conceptual problem of allowing the local entities to oppose state environmental policy which they would normally be without power to contravene. *Id.* at 415-16. However, the court noted that under the circumstances it would treat the local entities as the court's advisors regarding the economic impact of any proposed regulation. *Id.* at 416. It is clear that the present case is much more in the nature of ordinary civil litigation. This is not an abatement action, and the court may not engage in any weighing of interests. This court is interested in the contents of the regulations at issue in this case only insofar as they indicate whether the Sec-

retary has met his statutory duty in approving their adoption. The court in *Reserve Mining* took great pains to indicate the exceptional nature of the case before it as a means of justifying its wide-ranging grant of intervention. Absent such extreme circumstances, this court must be more circumspect in allowing intervention.

The final case upon which the proposed intervenors in Group I principally rely is *P.I.R.G.* v. *Regents, supra.* In that case, a public interest group attacked a New York State regulation governing pricing policies in pharmacies. An association of pharmacists sought to intervene so as to represent their economic interests in the matter. The court held that while the question of adequacy of representation was a close one, there was a substantial likelihood that the pharmacists would represent their own economic interests more vigorously than would the state, especially in light of the state's admission that its interests might be adverse to those of the pharmacists. 516 F.2d at 352. It should be noted that the entities in Group I are not private groups seeking to maximize profits, but they are all public entities which, in one way or another, are bound closely by state regulation. It is this nature of the governmental relationship between the state of Colorado and the proposed intervenors in Group I which forms the crux of the argument advanced by the parties opposing the intervention motion.

In opposing the motion of Group I for intervention, the plaintiff and the federal defendants urge this court to accept the doctrine of *parens patriae* as presented by the Supreme Court in *State of New Jersey* v. *State of New York,* 345 U.S. 369, 73 S.Ct. 689 (1953). In that case, the state of New York, upon petition of New York City, planned to divert the waters of the Delaware River for drinking water purposes. The state of New Jersey brought an original action in the Supreme Court to enjoin the diversion, and forcibly joined New York City as an indispensible party defendant. The state of Pennsylvania was also allowed to

intervene as a user of the Delaware River waters, and the case proceeded to judgment before a special master who devised a plan for the use of the waters. Some years later, the city of New York petitioned to reopen the case so as to modify the plan and increase its share of the water supply. Upon reopening, the City of Philadelphia petitioned to intervene on the grounds that it too relied on the river for water. In rejecting the petition to intervene, the Supreme Court relied on the doctrine of *parens patriae*:

> The "parens patriae" doctrine . . . is a recognition of the principle that the state, when a party to a suit involving a matter of sovereign interest, "must be deemed to represent all its citizens." Com. of Kentucky v. State of Indiana, 1930, 281 U.S. 163, 173-174, 50 S.Ct. 274, 277, 74 L. Ed. 784. The principle is a necessary recognition of sovereign dignity, as well as a working rule for good judicial administration. Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties.

Id. at 372-373, 73 S.Ct. at 691. After cataloging the problems which would ensue if the Court became involved in "an intramural dispute over the distribution of water within the Commonwealth," *id.* at 373, 73 S.Ct. at 691, the Court stated:

> An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state.

Id.

Although the Supreme Court made this analysis of the *parens patriae* doctrine within the context of its original jurisdiction, the doctrine is not limited to that situation.

The Third Circuit advanced a similar analysis in *Commonwealth of Pennsylvania* v. *Rizzo*, 530 F.2d 501 (3d Cir. 1976), and stated:

> [A] presumption of adequate representation generally arises when the representative [of a proposed intervenor's interest] is a governmental body or officer charged by law with representing the interests of the absentee. . . . Where official policies or practices are challenged, it seems unlikely that anyone could be better situated to defend than the governmental department involved and its officers.

Id. at 505. All of the entities in Group I are state agencies or offices, or municipalities within the state of Colorado. None have offered any compelling reason or circumstance in which they validly differ with the position taken by the state of Colorado. The formulation of these salinity control standards were expressly left to the states of the Colorado River Basin. The various public subdivisions which here seek to intervene do not allege that the states or the federal government acted illegally in promulgating these regulations. The issues of the allocation of the water levels approved, or the implementation of these regulations are not before this court. As such, the interests advanced by these proposed intervenors in upholding the validity of these previously promulgated regulations would appear to be identical with those interests advanced by the states. Since the states adequately represent the interests of these entities, intervention as of right is denied.

B. Metropolitan Water District of Southern California

The second motion to intervene was filed by the Metropolitan Water District of Southern California. By its own admission, this proposed intervenor is a public corporation created by the Metropolitan Water District Act of California, with its primary functions being to develop,

store and deliver water to approximately 27 other public agencies, which in turn distribute the water to approximately half of the population of the state. The reasons in support of this motion are similar to those advanced by the entities in Group I, *supra*. Since the Metropolitan Water District is a creature of the state of California, and since the state of California has already intervened in this action, the Metropolitan Water District's motion to intervene as of right is denied for the same reasons as were advanced regarding Group I, *supra*.

C. Utah Power and Light Co.

Utah Power and Light Co. (hereinafter U.P.&L.), a utility company which supplies a large portion of the total electricity used in the states of Utah and Wyoming, filed the third motion to intervene. U.P.&L. holds several water use permits and water storage licenses in connection with its hydroelectric generating plant on the Colorado River. U.P.&L. indicates that if it is not permitted to intervene, it will be unable to protect its interests in these permits and licenses.

Granting that U.P.&L. has an interest in this matter, it appears that, in a general sense, denial of this motion may impair U.P.&L.'s ability to protect that interest. This suit is not simply seeking a review of administrative action. It is a citizen's suit brought pursuant to 33 U.S.C. § 1365(a) to compel the Administrator to do some nondiscretionary act. Such a suit may be brought by "any citizen", and section 1365(g) defines the term "citizen" as "a person or persons having an interest which is or may be adversely affected." Although the right to intervene in an enforcement action has been limited, 33 U.S.C. § 1365(b), *see Stream Pollution Control Bd. of Indiana* v. *U.S. Steel Corp.*, 512 F.2d 1036, 1041 (7th Cir. 1975), no limitation has been created for citizen suits. Therefore, it seems sufficient, as far as the impairment of interest requirement, that there is a possibility that

if this court invalidates these regulations, the ensuing rule-making may result in a curtailment of U.P.&L.'s water use and storage rights.

The court must, therefore, determine once again whether the parties already present in this suit adequately represent the interests of the moving entity. The states of Utah and Wyoming represented to the court in their motions to intervene that they could protect the interests shared by their citizenries in water quality control, water resource planning and allocation, and the various forms of economic development dependent on the river. U.P.&L. admits that it does not disagree with the positions taken by any of the other defendants in this matter, but rather states that inadequacy of representation results since its interest is more specific than those represented by the states and federal defendants.

Although the standard for determining inadequacy of representation is lenient, the moving party still bears the burden of showing that representation may be inadequate. *Trbovich* v. *United Mine Workers, supra.* Also, though it is true that in some cases the existence in the moving party of a more narrow interest than those represented by the current parties may justify intervention, the cases so holding primarily involve situations in which the court must perform a quasi-administrative function, *N.R.D.C.* v. *Costle, supra; United States* v. *Reserve Mining Co., supra;* or where the interests of the governmental representative of individual claims is actually adverse to those claims. *State of New Mexico* v. *Aamodt,* 537 F.2d 1102 (10th Cir. 1976) (Navajo Indians permitted to intervene in water rights suit despite U.S. duty to represent them since U.S. interest in the suit was adverse to Indian water claims); or where the provision in question specifically deals with an area of economic regulation which the state admittedly could not adequately represent, *P.I.R.G.* v. *Regents, supra.* The present case involves none of these situations. This case deals with the

adequacy of the salinity standards promulgated by the states and whether the Administrator fulfilled his statutory duty in approving these plans. As such, the parties are limited to arguing for or against the validity of these regulations. Individual interests such as those U.P.&L. seeks to advance are largely irrelevant. U.P.&L.'s arguments directed at the subject matter of this case will be cumulative of the arguments advanced by the other defendants. Therefore, this court is of the opinion that U.P.&L. is adequately represented in this case, and the motion to intervene as of right is accordingly denied.

D. Intervention Group II

The final motion to intervene was filed by a group of four diverse entities from a variety of the Basin states. The Mountain States Legal Foundation is a non-profit public interest law center which states that it seeks to intervene on behalf of its directors, officers, supporters and other individuals who rely on the water of the Colorado River for consumptive uses. The National Water Resources Association represents the water users of 18 Western States. Some of its members rely on the Colorado River for irrigation and municipal water supplies. The Colorado Water Congress represents 1,800 individual water users within the state of Colorado, most of whom are either municipalities or industries. Finally, the Yuma Auxillary Project is an irrigation district in southern Arizona which contracts with the United States for the use of the Colorado River waters for irrigation. These four groups seek jointly to protect their members' interests in maintaining their consumption rights to the Colorado River waters as presently allocated under the existing interstate water compacts among the Basin states.

Because of the flexible standards applied to the determination of whether a proposed intervenor has an interest in a case at all, it would be difficult to say that these four intervenors do not possess such an interest since all of them

represent people and corporations which use the Colorado River water in one way or another. Similarly, because the end product of this suit might be that new, more restrictive regulations may be made, it is difficult to say that the proposed intervenors will not be practically impeded in the defense of their interests if intervention is denied. However, the interests expressed by the intervenors in Group II are so general that it must, as a matter of law, be stated that the states adequately represent those interests. There is no evidence of any disagreement between the states and the intervenors in this group. The interests advanced are shared by all the citizens of the Basin states and therefore the representation of those general, non-adverse interests should be left to the states under the doctrine of *parens patriae* as outlined above. If such were not the case, there would be no limit to the intervention as of right which might occur. Therefore, because the entities in Group II represent general interests shared by the entire populations of the intervening states, intervention as of right should be denied. *See Stream Pollution Control Board of the State of Indiana* v. *U.S. Steel Corp.*, 61 F.R.D. 31, 35 (N.D. Ind. 1974), *aff'd* 512 F.2d 1036 (7th Cir. 1975) (individual intervention into suit to abate whether pollution denied where proposed intervenor's only interest in suit was same at that of the general public).

II. Permissive Intervention.

All of the entities moving for intervention as of right have also moved in the alternative for permissive intervention. Under Federal Rule of Civil Procedure 24(b), the court may permit intervention when the applicant's claim or defense has a common issue of law or fact with the main action, and where the court in the exercise of its sound discretion determines that the intervention will not unduly delay or prejudice the adjudication of the case of the original parties. A motion for permissive intervention is addressed to the court's discretion, and the court's action on

such a motion will not be reversed unless the court abused its discretion. *Brewer* v. *Republic Corp.*, 513 F.2d 1222 (6th Cir. 1975); *Garrett* v. *United States*, 511 F.2d 1037 (9th Cir. 1975).

Regarding the entities in Intervention Group I, and the Metropolitan Water District of Southern California, the doctrine of *parens patriae* indicates that it may be prejudicial to the states which have already intervened in this suit to allow the various political subdivisions of the states the opportunity to question state policy which the entities might not otherwise have. Since as a matter of law these entities are represented by the states, any evidence they offer will be merely cumulative, and in that respect an unwarranted delay will occur. Therefore, this court will, in the exercise of its discretion, deny permissive intervention to the entities in Group I and to the Metropolitan Water District of Southern California.

The situation presented by Utah Power and Light is analogous. U.P.&L. has indicated no way in which it will supplement the position already taken by the other parties. The views of U.P.&L. has indicated that it will express are unlikely to be helpful to this court in the resolution of this matter. *Commonwealth Edison Co.* v. *Train*, 71 F.R.D. 391 (N.D. Ill. 1976). Therefore, this court should in the exercise of its discretion deny permissive intervention to Utah Power and Light.

The entities in Intervention Group II present a somewhat different situation. These entities have indicated that regardless of the type of intervention they receive, they seek intervention for the sole purpose of assuring that this court gives adequately consideration to the various interstate compacts regulating water use in the Colorado River Basin, and the extent to which Congress and the courts have adopted these compacts. Examination of the answers submitted by the states indicates that only New Mexico and Wyoming advance any arguments based on these compacts.

However, neither of these two states seem to intend to engage in the depth of analysis promised by the entities in Group II. These interstate conferences and compacts are crucial to an understanding of the problems faced by the Basin states and the Administrator in adopting salinity control plans. As such, the information offered by the entities in Group II would appear to be helpful to the court in the consideration of this matter. *Commonwealth Edison Co.* v. *Train, supra.* Therefore, the court will permit the entities in Group II to intervene for the limited purpose of briefing the court on the extent and effect of the various interstate water use compacts in the Colorado River Basin.

An appropriate Order accompanies this Memorandum Opinion.

/s/ THOMAS A. FLANNERY
UNITED STATES DISTRICT JUDGE

DATED: April 20, 1978

APPENDIX 3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-1436

ENVIRONMENTAL DEFENSE FUND, INC., *Plaintiff*,

vs.

DOUGLAS M. COSTLE, et al., *Defendants*.

and

THE STATES OF ARIZONA, CALIFORNIA, COLORADO, NEW MEXICO, UTAH, and WYOMING, *Intervenor-Defendants*.

MEMORANDUM IN SUPPORT OF THE MOTION TO INTERVENE OF THE COLORADO RIVER WATER CONSERVATION DISTRICT; SOUTHWESTERN WATER CONSERVATION DISTRICT; NORTHERN COLORADO WATER CONSERVANCY DISTRICT; CITY OF COLORADO SPRINGS WATER CONSERVANCY DISTRICT; CITY OF AURORA, COLORADO; BOARD OF WATER WORKS, PUEBLO, COLORADO; AND THE CITY AND COUNTY OF DENVER ACTING BY AND THROUGH ITS BOARD OF WATER COMMISSIONERS

Filed February 1, 1978

The State of Colorado, by and through its attorney J. D. MacFarlane, Attorney General of the State of Colorado, wishes to support the intervention of the following governmental subdivisions of the State of Colorado:

The Colorado River Water Conservation District;

Southwestern Water Conservation District;

Northern Colorado Water Conservancy District;

City of Colorado Springs Water Conservancy District;

City of Aurora, Colorado;

Board of Water Works, Pueblo, Colorado; and

The City and County of Denver acting by and through its Board of Water Commissioners.

By the unique nature of the Colorado doctrine of prior appropriation these entities are the owners of water rights out of the Colorado River which they only can properly represent. While the State of Colorado does represent the entire state and the concerns of its citizens and agencies generally, it cannot represent specific concerns or groups of citizens. As a party intervenor, the State of Colorado is interested in defending its duly promulgated water quality standards, EPA's considered approval of those standards, its right as a state to utilize certain equitably apportioned waters of the Colorado River, but it cannot represent or protect each individual water right owner's specific interest.

The entities herein described do have significant investment in facilities and governmental powers and responsibilities which may be affected by this litigation. If these entities are permitted to intervene by this Court, the undersigned counsel for the State of Colorado are convinced that discovery and briefing could proceed in conjunction with respect to issues which are shared commonly in this litigation.

FOR THE ATTORNEY GENERAL:

/s/ DAVID W. ROBBINS
David W. Robbins
Deputy Attorney General

/s/ GREGORY J. HOBBS, JR.
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Supreme Court, U. S.
FILED
NOV 24 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-678

COLORADO RIVER WATER CONSERVATION DISTRICT; SOUTHWESTERN WATER CONSERVATION DISTRICT; NORTHERN COLORADO WATER CONSERVANCY DISTRICT; CITY OF COLORADO SPRINGS; CITY OF AURORA; BOARD OF WATER WORKS, CITY OF PUEBLO; AND THE CITY AND COUNTY OF DENVER,

Petitioners,

v.

ENVIRONMENTAL DEFENSE FUND, INC., AND DOUGLAS M. COSTLE, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE STATE OF COLORADO AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-678

COLORADO RIVER WATER CONSERVATION DISTRICT; SOUTHWESTERN WATER CONSERVATION DISTRICT; NORTHERN COLORADO WATER CONSERVANCY DISTRICT; CITY OF COLORADO SPRINGS; CITY OF AURORA; BOARD OF WATER WORKS, CITY OF PUEBLO; AND THE CITY AND COUNTY OF DENVER,
Petitioners,

v.

ENVIRONMENTAL DEFENSE FUND, INC., DOUGLAS M. COSTLE, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF STATE OF COLORADO AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIOARI

QUESTION PRESENTED

Whether the Court of Appeals was in error in applying the doctrine of *parens patriae* to preclude the intervention of admittedly interested parties where the state of their location, as an intervenor itself had supported their intervention and had informed the district court that it could not adequately represent the interests of those parties?

INTEREST OF AMICUS CURIAE

The State of Colorado was admitted as an intervenor-defendant in the ongoing litigation below concerning the control of salinity in the Colorado River. The petitioners sought to intervene in this litigation at about the same time as the State. The State fully supported the intervention of the petitioners because of the diverse rights and interests they represent on both the Eastern and Western Slopes of the Continental Divide, within Colorado. The State of Colorado is interested in assuring that *all* of its citizens and their concerns are adequately represented in litigation which touches so closely upon their vital interests. As the party in the district court upon whom the burden of representing many diverse interests has now been placed as a result of the Court of Appeals decision, the State of Colorado has a substantial interest in seeing that the propriety and reasonableness of that decision be reviewed. Moreover, the State of Colorado is in fundamental disagreement with the Court of Appeals conception of the political operation of states vis-a-vis cities and water districts; and, as a result further supports review of that decision by this Court.

STATEMENT AND REASONS FOR GRANTING THE WRIT

Amicus curiae adopts as its statement of the case and reasons for granting the writ the statement and reasons set forth in the Petition for Certiorari, adding the following reasons.

IMPORTANCE OF GRANTING THE WRIT

The State of Colorado strongly urges the granting of the writ of certiorari in this case not only because of the unfairness resulting here from the plain error below, but because the standard established for participation in litigation by States and their citizens is fundamentally unsound, impossible of application and unreasonable in result. It is of extreme importance that the Court grant the writ to review the appropriateness of the "political processes" standard of the D.C. Circuit. Indeed, summary reversal of the *per curiam* action below would appear warranted to permit the requisite participation by petitioners in the continuing litigation.

The court below stated that the States "may not readily relinquish their sovereign functions of resolving differences (if any) among their political subdivisions and citizens' views on water plans and rights as they relate to this case once they have intervened to represent those subdivisions and citizens." While Colorado is not aware of any action by it which warranted this statement of the court, so that there may be no misunderstanding Colorado states unequivocably that it has relinquished *none* of its sovereign functions. Indeed its intervention in this suit is clear evidence of its intention to defend those functions to the utmost. What it cannot do, however, and what it should not be *required* to do, as it would by the Circuit's broad generalizations on *parens patriae*, is to represent and defend specific interests and responsibilities of individual groups which stand to be af-

fected. At the least, this broad "sovereign function" approach should not be permitted to bar participation by an entity in the State which perceives possible damage to its interests as a consequence of litigation, which is certainly possible here, and which is not only entirely capable of defending those specific interests but has been endowed and required by the State Legislature to act in the capacity.

With respect to the petitioners here for example the laws of the State of Colorado require the Colorado River Water Conservation District and the Southwestern Water Conservation District to take great responsibility for the study, development and utilization of the waters within their respective boundaries. Specifically they are each charged with the responsibility to "perform all acts and things necessary or adviseable to secure and insure an adequate supply of water, present and future, for irrigation, mining, manufacturing and domestic purposes within said districts;" Colorado Revised Statutes 1973, 37-46-107(1)(c) and 37-47-107(1)(c). A full recitation of the powers and duties, including the right to sue or be sued may be found in Colorado Revised Statutes 1973, 37-46-107 and 37-47-107 generally. The Water Conservancy Act, Colorado Revised Statutes 1973 37-45-101 *et seq*, provides the Northern Colorado Water Conservancy District with various powers and responsibilities separate from those of the state government. As to the cities of Colorado Springs, Aurora, Pueblo and Denver, all petitioners herein, the Court's attention is respectfully directed to Article XX of the Colorado Constitution entitled "Home Rule Cities and Towns". In Article XX, Section 6 the people of the state of Colorado granted to the named petitioners and others the following:

> It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters and the enumeration herein of

certain powers shall not be construed to deny such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right.

The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superceded by the charters of such cities and towns or by ordinance passed pursuant to such charters.

It is the firm position of the state of Colorado that these entities are entitled by the State Constitution to a separate position when it concerns matters of local concern and impact such as municipal water supply. *See, Colorado Open Space Council, Inc. v. City and County of Denver,* ——— Colo. ———, 543 P.2d 1258 (1975).

The mechanical application by the Court of Appeals of the *parens patriae* doctrine to the facts of this case, without consideration of the policies underlying the doctrine, sets a dangerous and unrealistic precedent for determining when citizens within a state should be permitted to intervene in litigation where their state is already a party. The doctrine of *parens patriae* was derived from the idea that the sovereign was "the general guardian of all infants, idiots and lunatics". 3 W. Blackstone, Commentaries 47; *See, Hawaii v. Standard Oil,* 405 U.S. 251, 257 (1973). The sovereign's capacity as *parens patriae* traditionally involved the state as a protector of those unable to protect themselves. *See, Hawaii v. Standard Oil, id.* at 257 (1973). In the United States the doctrine expanded from one designed to protect only those incapable of protecting themselves to one which recognized the right of a state to bring suit on behalf of all of her citizens and affirmatively to represent their common interest. *See, id.* at 258-29; *Pennsylvania v. New Jersey,* 426 U.S. 660, 665 (1975). This Court has explicitly recognized that the state when acting in its role as *parens patriae* does not displace the individual claims of its citizens:

> [A] State has standing to sue [as *parens patriae*] only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens.

Id., *see*, *Kansas v. United States*, 204 U.S. 331 (1921) (states may not invoke original jurisdiction of Supreme Court to prosecute purely personal claims of their citizens). *Accord*, *Pennsylvania v. Kleppe*, 533 F.2d 668 (D.C. Cir. 1976).

In the present case, the petitioners have a more specific and particular interest in the subject matter of the suit than that of the state acting as *parens patriae*. The State of Colorado finds highly anomalous the present situation where those interests most directly affected are denied recognition as parties by reference to a doctrine which originated only to protect those wholly unable to protect themselves and which was expanded only to permit, in certain situations, representation of the common interest so as to supplement, but not to replace, the participation of those most directly affected. The application of *parens patriae* by the court below should be reviewed by this Court so as to apply *parens patriae* in accord with its underlying policies.

Although the State recognizes the need of the judiciary to protect itself from burdensome or duplicative litigation occasioned by unnecessary parties, the circuit's decision goes beyond such protection and imposes a severe restriction on access to the courts by governmental subdivisions possessing interests in need of judicial protection.

The rapid evolution of state and local governmental units has created numerous situations where the interests of these entities are not identical and where both the State and the locality need separate representation. The divergent obligations and responsibilities of state and local governments are more visible and emergent as each day passes.

Here for example there is a clear threat involving water, a most precious resource of the state and a limited resource subject to competing rights and competing demands among not only state and local government units but with the federal government itself. These considerations suggest that the individual interests of the districts and cities petitioning here cannot be unified with those of the State of Colorado by the simple exhortation made by the court below to resort to the "political processes", anymore than the different interests of the State and federal government could be composed in this fashion. The districts and cities have interests distinct from those of the State of Colorado and as shown by the above citations, also have the responsibility to respond in protection of those interests. Because the separate interests of the districts and cities should be represented in this case and because there are interests which they only can properly and adequately represent, the decision of the Court of Appeals should be reviewed by this Court.

The decision below, if permitted to stand, will result in the denial of judicial protection to interested entities even where the need for protection of those interests is recognized by their state of location. To presume that a particular state can adequately represent the diverse interests of all of its citizens does not reflect reality. *See, U.S. v. Reserve Mining*, 56 F.R.D. 408 (D. Minn. 1978). The fact that the entity itself views its interest as unprotected should carry great weight consistent with the liberal standard for intervention adopted by this Court in *Trbovich v. UMW*, 404 U.S. 425 (1972). *See*, Wright & Miller, Federal Practice and Procedure § 1909, at 522-532 (1972). When a state declares that it cannot adequately represent the specific interests of one of its citizens, and that citizen is ready, willing and able to incur the time and expense of litigation, the doctrine of *parens patriae* is a peculiarly inappropriate authority upon which to base the court's refusal to permit that citizen's participation.

CONCLUSION

For the foregoing reasons, the State of Colorado as *amicus curiae* respectfully urges that certiorari be granted in this case.

Respectfully submitted

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